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# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: R-216530

DATE: February 13, 1985

MATTER OF: Hewlett-Packard Company

## DIGEST:

1. Bid accompanied by letter from bidder which deletes "Subcontracts Under Fixed-Price Contracts" clause is nonresponsive because deletion of this mandatory clause is a material deviation that restricts the government's rights and eliminates the bidder's responsibility; any contract awarded would not be the contract offered all bidders.
2. A bidder is not permitted to make its nonresponsive bid responsive after bid opening by removing an exception to a mandatory contract clause because such action would be tantamount to permitting the bidder to submit a new bid.

Hewlett-Packard Company protests the rejection of its low bid of \$845,000 as nonresponsive under invitation for bids (IFB) No. DAADO5-84-B-0528, issued by the U.S. Army Test and Evaluation Command, Aberdeen Proving Ground, Maryland. The IFB called for 21 flash X-ray systems, complete with gimbal supports, training, and spare parts. The Army received one other bid from Scandiflash AB in the amount of \$1,237,236. Hewlett-Packard contends that its bid is responsive because the deletions and changes to certain contract clauses required by the Federal Acquisition Regulation (FAR) that Hewlett-Packard requested in its bid are not material. Under the circumstances, Hewlett-Packard argues, these should be waived as minor informalities.

We deny the protest.

In a letter accompanying its bid, Hewlett-Packard stated:

"Hewlett-Packard's offer is contingent on the following deletion and changes:

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"FAR [§] 52.244-01 (Subcontracts Under Fixed-Price Contracts) - This clause must be deleted in its entirety.

"FAR [§] 52.249-02 (Termination for Convenience of the Government (Fixed-Price)) - This clause is acceptable only if the following statement is included: 'Notwithstanding any substitution such as Buyer for Contracting Officer or Government, only the Government shall have ready access to Contractor's books of account and cost records.' Additionally, the first two lines of subparagraph (c) must be deleted." (The sections are correctly numbered 52.244-1 and 52.249-2.)

The contracting officer rejected Hewlett-Packard's bid as nonresponsive because he found that the cover letter which accompanied Hewlett-Packard's bid imposed conditions that limited the rights of the government under these mandatory contract clauses. FAR § 44.204(a)(1)(i), 48 Fed. Reg. 42,102, 42,390 (1983) (to be codified at 48 C.F.R. § 44.204 (a)(1)(i)), requires the "Subcontracts Under Fixed-Price Contracts" clause to be included in all fixed-price contracts expected to exceed \$500,000. There are no applicable exceptions in the FAR permitting exclusion of this mandatory clause in a covered IFB, and the contracting officer has no authority to delete it.

As indicated by Hewlett-Packard, the subcontracts clause is not applicable to firm, fixed-price contracts unless and until they are changed by an unpriced modification. See FAR § 52.244-1 (a). The clause is then only applicable to certain subcontracts, e.g., cost-reimbursement subcontracts expected to exceed \$25,000, including fee, or fixed-price subcontracts expected to exceed \$100,000. Id. § 52.244-1(b).

Consequently, Hewlett-Packard contends that the deletion of this clause has a de minimis impact on price, quantity, quality, or delivery and does not affect the relative standing of the bidders. In this regard, Hewlett-Packard contends that it will very likely have no subcontracts which could qualify under FAR § 52.244-1(b),

and the almost \$400,000 savings resulting from an award to it will provide ample protection against any financial impact that might arise from an unanticipated unpriced modification. Therefore, Hewlett-Packard argues that the deviation is not material, is germane only to the administration of the contract, and may be waived as a minor informality under FAR § 14.405. Hewlett-Packard, however, sent a letter to the Army offering to remove the conditions to which the government objected shortly after bid opening.

It is a fundamental rule of federal procurement that all bidders must compete for advertised contracts on a common basis. Bidders have a right to assume that the essential requirements of an invitation are the same for all bidders. 46 Comp. Gen. 275, 277 (1966); ROARDA, Inc., B-204524.5, May 7, 1982, 82-1 CPD ¶ 438.

Further, to be considered for award, a bid must be responsive, i.e., must comply in all material respects with the invitation for bids. See FAR § 14.301(a). If a bidder attempts to impose conditions that would modify requirements of the invitation or limit the bidder's liability to the government, FAR § 14.404-2(d) requires the bid to be rejected, since to allow the bidder to impose such conditions would be prejudicial to other bidders. The regulation specifically requires rejection of any bid in which the bidder "limits rights of the government under any contract clause." See also Channel Disposal Co., B-215486, Aug. 17, 1984, 84-2 CPD ¶ 191; F.M. Gostrovich Construction Co., B-180362, Feb. 14, 1974, 74-1 CPD ¶ 74.

Here, by conditioning its bid on the deletion of the "Subcontracts Under Fixed-Priced Contracts" clause, Hewlett-Packard limited its liability to the government. Such action by its nature was prejudicial to other bidders. Dubie-Clark Company, B-186918, Aug. 26, 1976, 76-2 CPD ¶ 194. Despite its limited applicability as discussed above, the clause does require the contractor to provide certain information with respect to the negotiation of covered proposed subcontracts and to obtain the contracting officer's approval of the subcontracts. These are material legal rights of the government. Indeed, the fact that this clause is mandatory for inclusion in fixed-price contracts over \$500,000 establishes its materiality. See Dubie-Clark Co., supra.

Hewlett-Packard argues that unless the government can show, by reference to Hewlett-Packard's particular circumstances, that the deletion has a material impact on price, quality, quantity, or delivery, it may be waived after bid opening as a minor informality. It is true that whether the government may exercise its rights under this clause is speculative, because it depends upon an unpriced contract modification with a significant subcontract. However, we do not believe a contracting officer should be required to analyze the particular situation to ascertain whether changes may or may not be issued and whether any changes will require significant subcontracting. See Premier Electric Supply, Inc., B-191184, July 21, 1978, 78-2 CPD ¶ 59; Dubie Clark Co., supra, (bidders taking exception to required warranty and default provisions, respectively, are nonresponsive, although it is speculative whether the government will exercise its rights under these clauses in administering the contracts). Consequently, Hewlett-Packard's deletion of this subcontract clause indicates that the bidder did not intend to be bound by a material condition of the IFB, an intent which must be ascertained from the bid documents only. Giant Lift Equipment Manufacturing, B-213558, May 22, 1984, 84-1 CPD ¶ 542.

Finally, we find that the Army properly rejected Hewlett-Packard's attempt to delete the objectionable conditions shortly after bid opening. The responsiveness of a bid must be determined at the time of the bid opening, and a bidder may not explain the meaning of a bid after this time. See Aeroflow Industries, Inc., B-197628, June 9, 1980, 80-1 CPD ¶ 399. We have held that to permit a bidder to make its bid responsive after bid opening would be tantamount to permitting the bidder to submit a new bid. Consecraft, Inc., B-201065, July 20, 1981, 81-2 CPD ¶ 51; Recording Consultants, Inc., B-201629, May 6, 1981, 81-1 CPD ¶ 355. Since Hewlett-Packard's deletion of the subcontract clause was a material deviation, the firm could not modify the objectionable portions of its bid after bid opening. Valley Forge Co., Inc., B-216108, Sep. 4, 1984, 84-2 CPD ¶ 251.

In view of the above, we need not decide whether Hewlett-Packard's proposed changes to the "Termination for Convenience of the Government" clause are material.

We trust, however, that the Army will review Scandiflash's bid to assure that its price is reasonable. See FAR § 14.404-2(f).

The protest is denied.

*Harry D. Van Cleave*  
*for* Comptroller General  
of the United States